

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MICHAEL C. STERNBERG,

Case No.: 2:23-cv-01466-APG-EJY

Plaintiff

V.

SHELLEY WARNECK, et al.,

Defendants

Order Granting in Part Defendant Shelley Warneck's Motion to Dismiss

[ECF Nos. 124, 135]

8 Plaintiff Michael Sternberg sues 75 individuals and entities regarding events arising out
9 of a custody dispute with the mother of his children, defendant Shelley Warneck. In this order, I
10 address Warneck’s motion to dismiss the claims against her on a variety of grounds. She also
11 moves to dismiss the abuse of process and civil conspiracy claims and seeks attorney’s fees
12 under Nevada’s anti-SLAPP statute, Nevada Revised Statutes (NRS) § 41.660. Warneck also
13 joined a motion to dismiss filed by the Policastri Defendants regarding the application of the
14 *Rooker-Feldman* and *Noerr-Pennington* doctrines. ECF Nos. 131; 135. Sternberg opposes
15 dismissal, requests leave to amend, and requests leave to conduct discovery to oppose the anti-
16 SLAPP motion.

17 The parties are familiar with the first amended complaint's (FAC) allegations, so I repeat
18 them here only as necessary to resolve the motion to dismiss. I grant the motion to dismiss in
19 part, with leave to amend.

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1 **I. ANALYSIS**2 **A. *Rooker-Feldman***

3 Warneck argues that Sternberg's claims in counts 6, 7, 9, 11, and 12¹ are barred by the
 4 *Rooker-Feldman* doctrine because Sternberg effectively seeks to overturn state court rulings.
 5 Sternberg responds that the doctrine does not apply because he did not lose in state court, as none
 6 of his claims against the defendants has been adjudicated previously and there are no final
 7 judgments in the custody proceedings. He also contends that the doctrine does not apply because
 8 he is pursuing independent claims.

9 The *Rooker-Feldman* doctrine arises from two Supreme Court decisions defining federal
 10 district court jurisdiction and the relationship between federal district courts and state courts.
 11 Federal district courts possess "strictly original" jurisdiction and thus have no power to exercise
 12 subject matter jurisdiction over a de facto appeal from a state court judgment. *See Rooker v.*
 13 *Fidelity Trust Co.*, 263 U.S. 413, 414-17 (1923); *Dist. of Columbia Ct. of Appeals, et al. v.*
 14 *Feldman*, 460 U.S. 462, 482 (1983); *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir.
 15 2004). Only the Supreme Court of the United States has jurisdiction to review such judgments.
 16 *Feldman*, 460 U.S. at 482; *see also* 28 U.S.C. § 1257. The *Rooker-Feldman* doctrine "is
 17 confined to cases of the kind from which the doctrine acquired its name: cases brought by state-
 18 court losers complaining of injuries caused by state-court judgments rendered before the district
 19 court proceedings commenced and inviting district court review and rejection of those
 20 judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). If the
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¹ Count 6, 7, 9, 11, and 12 assert claims under 42 U.S.C. §§ 1983 and 1985, and state and federal constitutions. ECF No. 86-4 at 2-3, 5-8.

1 *Rooker-Feldman* doctrine applies, I must dismiss for lack of subject matter jurisdiction.

2 *Kougasian*, 359 F.3d at 1139.

3 The *Rooker-Feldman* doctrine does not deprive federal district courts of subject matter
4 jurisdiction in every case in which a party attempts to litigate in federal court a matter previously
5 litigated in state court. *Exxon Mobil*, 544 U.S. at 293. If a plaintiff presents an “independent
6 claim, albeit one that denies a legal conclusion that a state court has reached in a case to which
7 he was a party . . . , then there is jurisdiction and state law determines whether the defendant
8 prevails under principles of preclusion.” *Id.* (quotation omitted). For example, where a plaintiff
9 asserts an adverse party committed extrinsic fraud on the state court, *Rooker-Feldman* does not
10 bar the suit because the plaintiff states an independent claim. *Kougasian*, 359 F.3d at 1141.
11 “Extrinsic fraud on a court is, by definition, not an error by that court. It is, rather, a wrongful
12 act committed by the party or parties who engaged in the fraud.” *Id.* “*Rooker-Feldman* therefore
13 does not bar subject matter jurisdiction when a federal plaintiff alleges a cause of action for
14 extrinsic fraud on a state court and seeks to set aside a state court judgment obtained by that
15 fraud.” *Id.*

16 If there is a de facto appeal, the federal plaintiff “may not seek to litigate an issue that is
17 ‘inextricably intertwined’ with the state court judicial decision from which the forbidden de facto
18 appeal is brought.” *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003). A claim is “inextricably
19 intertwined with the state-court judgment if the federal claim succeeds only to the extent that the
20 state court wrongly decided the issues before it.” *Cooper v. Ramos*, 704 F.3d 772, 779 (9th Cir.
21 2012) (quotation omitted). Thus, a claim is inextricably intertwined “where the relief requested
22 in the federal action would effectively reverse the state court decision or void its ruling.” *Id.*
23 (quotation omitted).

1 Sternberg's allegation that Warneck removed the children from Nevada in 2019 is not
2 barred by *Rooker-Feldman* because it is not based on a state court error. *See* ECF Nos. 86-3 at 2-
3 3; 86-4 at 1-2. Rather, he alleges Warneck engaged in wrongful conduct relocating the children
4 to California in contravention of Warneck and Sternberg's agreement that the children would
5 live in Nevada. Absent further factual development, it is unclear whether his allegations related
6 to Warneck's alleged participation in Sternberg's arrest and the seizure of the children is barred
7 by *Rooker-Feldman*. Sternberg has leave to amend to allege facts related to this incident if he
8 can allege an independent claim.

9 But the rest of Sternberg's allegations against Warneck are de facto appeals of state court
10 rulings because he asserts harm from the California state court's alleged legal errors and seeks to
11 overturn, void, or otherwise necessarily imply the invalidity of those orders. For example, he
12 challenges decisions relating to the custody matter being decided in California rather than
13 Nevada, denying his motion for the children's return, denying his motion for contempt,
14 sanctioning him, ordering him to return the children to Warneck, and declaring him a vexatious
15 litigant. ECF Nos. 86-3 at 4, 8, 10; 86-4 at 7-9. And he requests as relief declarations that some
16 of the California state court orders are void, and specifically that Judge Hayashi's jurisdictional
17 order is void, rendering all the following orders in the custody case void as well. ECF No. 86 at
18 3-6. Sternberg also seeks an injunction barring Warneck from enforcing money judgments the
19 California court ordered. *Id.* at 6. Sternberg's contention that he is not a "state court loser"
20 because these orders are not final, and thus *Rooker-Feldman* does not apply, is incorrect.
21 *Rooker-Feldman* is not limited to final orders. It also applies to a state court's interlocutory
22 orders and non-final judgments. *Doe & Assoc. Law Offices v. Napolitano*, 252 F.3d 1026, 1030
23 (9th Cir. 2001). And it "applies even where the challenge to the state court decision involves

1 federal constitutional issues, including section 1983 claims.” *Benavidez v. Cnty. of San Diego*,
2 993 F.3d 1134, 1142 (9th Cir. 2021) (quotation omitted).

3 Sternberg contends that he is alleging independent claims. For his claim regarding
4 Warneck removing the children from Nevada, he is correct. And he may be correct regarding his
5 allegation about his arrest and the seizure of his children, but I cannot discern that from the
6 allegations as currently pleaded. Although Sternberg alleges extrinsic fraud on the state court
7 during the custody proceedings, he does so only in conclusory terms. For example, he alleges
8 that there was “perjury, fraud upon the court, [and] filing of false sworn documents” in the
9 custody case, and that Warneck’s attorney made “fraudulent filings with the court.” *See, e.g.*,
10 ECF No. 86-3 at 10-11. However, Sternberg also alleges that the state court judges participated
11 in the allegedly fraudulent conduct. *See, e.g.*, ECF Nos. 86-4 at 2-9. Thus, he is still asserting
12 harm from state court errors, rather than extrinsic fraud in the form of Warneck and her attorney
13 committing wrongful acts to fool the state court into its decisions.

14 His claims against Warneck, at least as presently pleaded, thus are inextricably
15 intertwined with his de facto appeals. Consequently, I dismiss Sternberg’s claims against
16 Warneck for lack of subject matter jurisdiction under *Rooker-Feldman* except for his claims
17 based on Warneck relocating the children in 2019.

18 Because Sternberg may be able to plausibly allege other claims against Warneck that are
19 not barred by *Rooker-Feldman*, I grant him leave to do so if he can allege facts supporting
20 independent claims against her. I advise Sternberg that if his theory is grounded in fraud, he
21 must meet Federal Rule of Civil Procedure 9(b)’s heightened pleading standard for pleading
22 fraud with particularity. Under that Rule, “the circumstances constituting the alleged fraud
23 [must] be specific enough to give defendants notice of the particular misconduct . . . so that they

1 can defend against the charge and not just deny that they have done anything wrong.” *Vess v.*
 2 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quotation omitted). The complaint
 3 must identify “the who, what, when, where, and how of the misconduct charged” and “must set
 4 forth what is false or misleading about a statement, and why it is false.” *Id.* (quotation omitted).
 5 Merely describing filings, statements, or other acts as “fraudulent” or “illicit” is insufficient.

6 Because I am granting Sternberg leave to amend, I address Warneck’s other arguments to
 7 determine if amendment would be futile and to provide guidance if I allow amendment.

8 **B. Failure to State a Claim**

9 In considering a motion to dismiss, I take all well-pleaded allegations of material fact as
 10 true and construe the allegations in a light most favorable to the non-moving party. *Kwan v.*
 11 *SanMedica Int’l*, 854 F.3d 1088, 1096 (9th Cir. 2017). However, I do not “assume the truth of
 12 legal conclusions merely because they are cast in the form of factual allegations.” *Navajo Nation*
 13 *v. Dep’t of the Interior*, 876 F.3d 1144, 1163 (9th Cir. 2017). A plaintiff must make sufficient
 14 factual allegations to establish a plausible entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550
 15 U.S. 544, 556 (2007). Such allegations must amount to “more than labels and conclusions, [or] a
 16 formulaic recitation of the elements of a cause of action.” *Id.* at 555.

17 1. Sections 1983 and 1985 and State Constitutional Claims²

18 Warneck argues that Sternberg’s claims under 42 U.S.C. § 1983 fail because she is not a
 19 state actor. Warneck argues that to the extent the FAC attempts to allege a conspiracy between
 20 her and state actors, it does so in only conclusory fashion.

21
 22
 23 ² The parties do not distinguish between the federal and state constitutional claims, so I address
 those claims together.

1 Sternberg responds that Warneck did not move to dismiss his § 1985 claims, so those
 2 claims remain pending. As for his § 1983 claims, he argues that because this is the pleading
 3 stage, he need only allege that each participant in the conspiracy shared a common objective, and
 4 he has alleged that Warneck and state actors conspired to seize his children without due process.
 5 Sternberg contends that fraud is not an element of a § 1983 claim, so he need not meet a
 6 heightened pleading standard, but he could do so on amendment if needed, although some of the
 7 facts he needs are exclusively in the defendants' control because he has been denied access to the
 8 custody case court file. In reply, Warneck argues that a § 1985 claim is a conspiracy to interfere
 9 with civil rights, so if there is no valid § 1983 claim, then there is no valid § 1985 claim.

10 a. *State Action*

11 To state a claim under § 1983, a plaintiff must plausibly allege that the defendant
 12 deprived him of a right secured by the Constitution and acted under color of state law. *Pasadena*
 13 *Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1166-67 (9th Cir. 2021). Traditionally, “acting
 14 under color of state law requires that the defendant in a § 1983 action have exercised power
 15 possessed by virtue of state law and made possible only because the wrongdoer is clothed with
 16 the authority of state law.” *West v. Atkins*, 487 U.S. 42, 49 (1988) (quotation omitted).

17 Conduct by a private actor presumptively is not state action. *Florer v. Congregation*
 18 *Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011). However, a private person or entity
 19 can, “in certain circumstances,” be a state actor. *Villegas v. Gilroy Garlic Festival Ass'n*, 541
 20 F.3d 950, 954 (9th Cir. 2008) (en banc). One way a private individual or entity may be liable
 21 under § 1983 is by engaging in joint action with a state actor. *Tsao v. Desert Palace, Inc.*, 698
 22 F.3d 1128, 1140 (9th Cir. 2012). The joint action test is met if “state officials and private parties
 23 have acted in concert in effecting a particular deprivation of constitutional rights.” *Id.* (quotation

1 omitted). A plaintiff can show joint action “either by proving the existence of a conspiracy or by
2 showing that the private party was a willful participant in joint action with the State or its
3 agents.” *Id.* (quotation omitted). To state a conspiracy between Warneck and state actors under
4 § 1983, Sternberg must plausibly allege “an agreement or meeting of the minds to violate
5 constitutional rights.” *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002) (quotation omitted).
6 “Ultimately, joint action exists when the state has so far insinuated itself into a position of
7 interdependence with [the private entity] that it must be recognized as a joint participant in the
8 challenged activity.” *Tsao*, 698 F.3d at 1140 (quotation omitted). “Joint action therefore requires
9 a substantial degree of cooperative action.” *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir.
10 1989). For example, “merely complaining to the police” does not suffice to make the
11 complaining party a state actor. *Id.* at 1155.

12 Warneck is a private citizen who presumptively is not a state actor. Sternberg has not
13 plausibly alleged facts to support a conspiracy or joint action theory to make her conduct
14 attributable to the State. Rather, the FAC alleges that Warneck brought a custody dispute in
15 California court and her attorney submitted declarations and proposed orders to the court in
16 California. Initiating a custody proceeding and asking a court for relief do not amount to state
17 action. The FAC also alleges that Warneck and her attorney “conspired” with a judge and
18 Sternberg’s own attorney to change the custody case from a “brief focused assessment” to a full
19 custody evaluation without Sternberg’s consent. ECF No. 86-3 at 7. He makes a similar
20 allegation that another attorney of his, a different judge, and Warneck’s attorney “conspired” to
21 alter a stipulation to continue trial without his consent. *Id.* at 8. And he alleges that Warneck
22 “conspired” with an investigator for the El Dorado County District Attorney’s Office to have
23 Sternberg arrested and the children seized and returned to Warneck. *Id.* at 4, 18. Labeling

1 something a conspiracy is insufficient to plausibly allege an agreement to violate constitutional
2 rights. The factual allegations do not support the conclusion that the State has so far insinuated
3 itself into a position of interdependence with Warneck that these private actors' conduct is
4 attributable to the State. In sum, the FAC does not plausibly allege that Warneck is a state actor,
5 so the § 1983 claims fail as a matter of law. However, I grant Sternberg leave to amend if he can
6 allege facts to support a § 1983 claim against Warneck.

b. Section 1985

8 Sternberg does not identify under what section or clause of § 1985 he brings his claims.
9 He appears to be relying on the second clause of § 1985(2) that prohibits conspiring for the
10 purpose of obstructing “the due course of justice” in a State “with intent to deny to any citizen
11 the equal protection of the laws.” He also appears to be relying on the first clause of § 1985(3)
12 that prohibits conspiring to deprive “any person or class of persons of the equal protection of the
13 laws.”

14 As discussed above, Sternberg has not plausibly alleged a conspiracy. I therefore dismiss
15 his § 1985 claims. Although Warneck does not raise the issue, as discussed in my order relating
16 to her attorney's motion to dismiss, both of the § 1985 provisions under which Sternberg is suing
17 require "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind
18 the conspirator's action." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 989 (9th Cir. 2001),
19 *opinion amended on denial of reh 'g*, 275 F.3d 1187 (9th Cir. 2001) (quotation omitted). The
20 Ninth Circuit requires a showing either that the courts have designated the class in question a
21 suspect or quasi-suspect class or that congressional legislation has established that the class
22 requires special protection. *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985). Sternberg
23 has not alleged that he belongs to a protected class or that Warneck conspired with others to

1 deprive him of equal protection based on his membership in that class. It appears unlikely that
 2 Sternberg could plausibly allege a § 1985 claim because his oppositions to Warneck's and her
 3 attorney's motions to dismiss do not suggest he could make these types of allegations. I
 4 nevertheless will allow Sternberg leave to amend his § 1985 claims if he can allege facts in
 5 support of them.

6 2. *Noerr-Pennington* Doctrine

7 Warneck argues that counts 6, 7, 9, and 11-17³ are barred by the *Noerr-Pennington*
 8 doctrine because Sternberg sues her for protected First Amendment petitioning activity related to
 9 filing motions and briefs in court, reporting Sternberg to law enforcement, and cooperating with
 10 the criminal investigation into Sternberg.

11 Sternberg responds that “abducting children is not a petitioning activity.” ECF No. 139 at
 12 5. He also argues that the doctrine should not apply where he alleges violations of his
 13 constitutional rights because applying the doctrine would defeat the purpose of the civil rights
 14 laws.

15 The *Noerr-Pennington* doctrine “is a rule of statutory construction that requires courts to
 16 construe statutes to avoid burdening conduct that implicates the protections of the Petition
 17 Clause of the First Amendment.” *United States v. Koziol*, 993 F.3d 1160, 1171 (9th Cir. 2021).
 18 While the doctrine was initially rooted in antitrust law, it now extends to the petitioning of any
 19 branch of government and to state common law claims. *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1006-07 (9th Cir. 2008). Thus, parties who petition the government
 21 are generally immune from liability for that activity. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929
 22

23 ³ Counts 6, 7, 9, 11-17 assert claims under 42 U.S.C. §§ 1983 and 1985, and state and federal constitutions. ECF No. 86-4 at 2-3, 5-14.

1 (9th Cir. 2006). This includes “[c]onduct incidental to the prosecution of [a] suit,” such as
2 “presuit demand letters and discovery communications.” *B&G Foods N. Am., Inc. v. Embry*, 29
3 F.4th 527, 535 (9th Cir. 2022) (quotation omitted).

4 To assess whether *Noerr-Pennington* applies, I employ “a three-step analysis to
5 determine: (1) whether the lawsuit imposes a burden on petitioning rights, (2) whether the
6 alleged activities constitute protected petitioning activity, and (3) whether the statute at issue
7 may be construed to avoid that burden.” *Id.* (simplified). “If the answer at each step is ‘yes,’
8 then a defendant’s conduct is immunized under *Noerr-Pennington*.” *Id.*

a. *Step One: Burden*

10 To determine whether the success of the plaintiff's lawsuit would burden petitioning
11 rights in the litigation context, I ask whether the lawsuit burdens the defendant's ability to
12 prosecute its suit. *Id.* Only some of Sternberg's allegations would burden Warneck's petitioning
13 activity in the custody suit. Sternberg's allegations related to Warneck's conduct during and in
14 relation to court proceedings, such as her attorney filing documents, submitting proposed orders,
15 and making arguments during court proceedings would burden her petitioning rights if Sternberg
16 succeeded in this lawsuit. To the extent Warneck requested law enforcement to act against
17 Sternberg, that petitioning activity likewise would be burdened. And although Sternberg
18 contends that applying *Noerr-Pennington* in this context undermines the civil rights statutes, the
19 Ninth Circuit has held that pursuing a § 1983 suit can burden a defendant's petitioning rights
20 under step 1. *Id.*

21 However, Sternberg asserts that Warneck took actions beyond petitioning a court or law
22 enforcement agency. Sternberg plausibly alleges that despite their agreement that the children
23 would live in Nevada, Warneck relocated the children by deceiving him into agreeing to a

1 temporary visit. Additionally, to the extent Sternberg can allege Warneck did something more
2 than merely request law enforcement assistance in relation to his arrest, then allowing this suit to
3 proceed would not burden petitioning activity.

b. Step Two: Protected Petitioning Activity

5 At step two, I determine whether the Petition Clause protects the defendant's activity. *Id.*
6 at 535-36. "Sham petitioning is not protected." *Id.* at 536; *see also Pyankovska v. Abid*, 65 F.4th
7 1067, 1077 (9th Cir. 2023) (stating that filing and arguing a custody motion was protected
8 petitioning activity but the defendant "was not free to support [his] motion with illegal
9 evidence"). Petitioning activity is a sham in the litigation context if: (1) "the lawsuit is
10 objectively baseless and the defendant's motive in bringing it was unlawful;" (2) "the conduct
11 involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without
12 regard to the merits and for an unlawful purpose;" or (3) the defendant's "knowing fraud upon,
13 or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *B&G*
14 *Foods N. Am., Inc.*, 29 F.4th at 537-38 (quotation omitted).

15 Whether the sham exception applies is a question of fact. *Rock River Commc’ns, Inc. v.*
16 *Universal Music Grp., Inc.*, 745 F.3d 343, 352-53 (9th Cir. 2014). At the motion to dismiss
17 stage, I decide only whether the plaintiff has plausibly pleaded that the sham exception applies,
18 accepting all well-pleaded facts as true. *See Kearney v. Foley & Lardner, LLP*, 590 F.3d 638,
19 647-48 (9th Cir. 2009) (holding the district court erred by requiring more than plausible pleading
20 of a sham exception at the motion to dismiss stage).

21 Taking Sternberg's allegations as true, he may be able to plausibly allege that the sham
22 exception applies. If he is able to do so, then Warneck's actions would not be protected
23 petitioning conduct. However, he has not done so yet. Sternberg alleges that Warneck, either

1 personally or through her attorney, made numerous false or fraudulent statements to the court
2 during the custody proceedings, and he appears to allege that those false statements were either
3 repeated to law enforcement or formed the basis of law enforcement's actions against him.
4 However, Sternberg does not plausibly allege what false statements Warneck or her attorneys
5 made, why they were false, or how those misrepresentations deprived the state court custody
6 proceeding or the law enforcement actions against him of their legitimacy. As discussed above,
7 if Sternberg is making allegations grounded in fraud, he must plead those allegations with
8 particularity. I therefore grant Warneck's motion to dismiss on this basis. But because it is
9 possible that Sternberg could cure these defects through amendment, I grant him leave to amend.

10 3. Section 125C.0075

11 Warneck argues that I do not have subject matter jurisdiction to address Sternberg's
12 claim under Nevada Revised Statutes (NRS) § 125C.0075 because Nevada's family courts have
13 exclusive jurisdiction over child custody disputes. She thus requests that I dismiss under *Burford*
14 abstention. Sternberg responds that I have subject matter jurisdiction due to the federal claims,
15 so I have supplemental jurisdiction over this claim. He also argues that *Burford* abstention does
16 not apply to claims for monetary relief, which is what he seeks for this claim. Warneck replies
17 that the statute does not allow for damages; rather it allows for an award of attorney's fees and
18 costs in an action in family court.

19 NRS § 125C.0075 provides that if a parent with primary or joint physical custody
20 relocates with a child under certain wrongful or criminal circumstances and the non-relocating
21 parent "files an action in response to the violation," then "the non-relocating parent is entitled to
22 recover reasonable attorney's fees and costs incurred as a result of the violation." This section is
23 contained within NRS Title 11 relating to domestic relations and under Chapter 125C related to

1 custody and visitation. Nevada has statutorily provided that “the family court has original,
2 exclusive jurisdiction in any proceeding . . . [b]rought pursuant to . . . chapter . . . 125C . . . of
3 NRS, except to the extent that a specific statute authorizes the use of any other judicial or
4 administrative procedure to facilitate the collection of an obligation for support.” NRS
5 § 3.223(a). Consequently, Sternberg’s claim under § 125C.0075 must be brought in the family
6 court. I therefore dismiss it with prejudice to reasserting it in this court, but without prejudice to
7 Sternberg pursuing relief in family court.

8 4. Tortious Interference with Parental Rights

9 Warneck argues that Nevada does not recognize a tort for interference with parental
10 rights. Sternberg responds by requesting that I certify to the Supreme Court of Nevada whether
11 this claim exists. Warneck replies that I should not certify the question because Nevada has a
12 statutory remedy, so the Supreme Court of Nevada is unlikely to recognize a common law tort
13 for the same conduct. She also contends that any such claim would have to be brought in
14 Nevada family court, even if it exists.

15 The Supreme Court of Nevada has not addressed whether a claim for tortious interference
16 with parental rights exists under Nevada law or, if it does, whether it can be brought by one
17 parent against the other, or whether the family court has exclusive jurisdiction over any such
18 claim. “Where the state’s highest court has not squarely addressed an issue, [I] must predict how
19 the highest state court would decide the issue using intermediate appellate court decisions,
20 decisions from other jurisdictions, statutes, treatises, and restatements as guidance.” *Judd v.*
21 *Weinstein*, 967 F.3d 952, 955-56 (9th Cir. 2020) (quotation omitted).

22 Another judge in this district has ruled that Nevada does not recognize such a claim and
23 instead provides for a statutory remedy under NRS Chapter 125C. *Doyle v. Jones*, No. 3:13-CV-

1 540-LRH-WGC, 2014 WL 3887906, at *5 (D. Nev. Aug. 7, 2014). The statute that *Doyle* cites
2 states that if physical custody has been established pursuant to a court order and the custodial
3 parent seeks to relocate the child out of Nevada or at a distance within the state that would impair
4 the other parent's relationship with the child, then the custodial parent must attempt to get the
5 other parent's or the court's permission to relocate. *Id.* (citing NRS § 125C.200, now codified at
6 NRS § 125C.006). A parent with court-ordered custody who relocates with a child without the
7 other parent's or the court's permission may be subject to criminal charges and be liable to pay
8 the other parent's reasonable attorney's fees and costs. NRS §§ 125C.006(3), 125C.0065(3)
9 125C.0075, 200.359.

10 Sternberg alleges that when Warneck first removed the children from Nevada, he and
11 Warneck had informally agreed to Sternberg being the "primary parent" while Warneck dealt
12 with a criminal DUI charge against her in California, and that the children would live in Nevada.
13 ECF No. 86-3 at 1-2. Under Nevada law, parents have joint legal and physical custody of a child
14 "until otherwise ordered by a court of competent jurisdiction." NRS § 125C.0015. It is unclear
15 whether the statutory remedies listed above are a parent's only remedies when the other parent or
16 a third party interferes with the parent-child relationship. And it is unclear what remedies apply
17 where, as here, there is no court-ordered custody arrangement that was allegedly violated.

18 In my discretion, "[w]hen state law issues are unclear, [I] may certify a question to a
19 state's highest court to obtain authoritative answers." *Potter v. City of Lacey*, 46 F.4th 787, 791
20 (9th Cir. 2022) (quotation omitted). Certification may be appropriate for state law issues that
21 carry "significant policy implications" and "will have broad application." *Id.*; *Kremen v. Cohen*,
22 325 F.3d 1035, 1038 (9th Cir. 2003). Nevada Rule of Appellate Procedure 5 permits me to
23 certify a question of Nevada law "which may be determinative of the cause then pending" in my

1 court when “it appears to [me] there is no controlling precedent in the decisions of the Supreme
2 Court or Court of Appeals of [Nevada].” The certified question does not have to resolve or
3 conclude the entire case; it only needs to be determinative of “part of the federal case.” *Volvo*
4 *Cars of N. Am., Inc. v. Ricci*, 137 P.3d 1161, 1164 (Nev. 2006) (en banc).

5 Given the lack of authority on point, the importance of whether such a tort exists and its
6 parameters, and the state court’s expertise with domestic relations law, I am inclined to certify to
7 the Supreme Court of Nevada the question of whether such a claim exists, under what
8 circumstances, against whom it can be maintained, and in what courts it may be pursued. I
9 therefore deny Warneck’s motion to dismiss this claim. Once Sternberg has completed
10 amending his complaint as to Warneck, any party may move to certify questions to the Supreme
11 Court of Nevada related to this claim.

12 5. Abuse of Process

13 Warneck contends the abuse of process claim fails because Sternberg has not alleged an
14 improper purpose other than resolving the custody dispute. She also argues that initiating legal
15 proceedings cannot constitute an abuse of process. And she asserts that any statements she made
16 in the California custody case or the criminal action against Sternberg are protected by the
17 absolute litigation privilege. Sternberg responds that Warneck abducted his children before they
18 brought or renewed the custody dispute in California, and “[a]bducting children and taking them
19 across state lines is not proper in the regular conduct of family court proceedings.” ECF No. 132
20 at 8. He also argues that the litigation privilege does not apply to her non-communicative acts of
21 deceiving him into allowing her to temporarily take the children out of Nevada and then
22 relocating them against his wishes. He argues that “[a]bduction is a predicate, independent, non-

1 communicative act . . . , as are false statements and filings in a court to prolong the abduction.”

2 *Id.* at 9.

3 To state an abuse of process claim under Nevada law, Sternberg must plausibly allege

4 (1) that Warneck had an ulterior purpose other than resolving a legal dispute, and (2) she

5 engaged in a willful act in the use of judicial process not proper in the regular conduct of the

6 proceeding. *LaMantia v. Redisi*, 38 P.3d 877, 880 (Nev. 2002); *see also Land Baron Inv. v.*

7 *Bonnie Springs Fam. LP*, 356 P.3d 511, 519 (Nev. 2015). For example, the Supreme Court of

8 Nevada found abuse of process when a city attorney charged a police officer with a criminal

9 violation to obtain the officer’s voluntary resignation. *Posadas v. City of Reno*, 851 P.2d 438,

10 445 (Nev. 1993). However, “filing a complaint does not constitute abuse of process.” *Land*

11 *Baron Inv.*, 356 P.3d at 520.

12 Sternberg has not plausibly alleged an abuse of process claim because he does not allege

13 that Warneck used judicial process in a manner that is not proper in the regular conduct of court

14 proceedings, nor does he allege an ulterior purpose. Sternberg’s reference to Warneck relocating

15 the children does not identify a use of judicial process to accomplish the relocation, much less

16 misuse of that process for an ulterior purpose. As for the alleged false statements in court

17 documents, Sternberg does not identify any false statements, why they are false, how they

18 constitute an abuse of process, or an ulterior purpose other than resolving the custody dispute.

19 Although he characterizes the false statements in court documents as non-communicative for

20 purposes of the litigation privilege, he does not explain how the unidentified statements would be

21 non-communicative. Even knowingly false statements in court proceedings are protected by the

22 absolute litigation privilege. *See Greenberg Traurig v. Frias Holding Co.*, 331 P.3d 901, 903

23 (Nev. 2014) (en banc). And the privilege applies to abuse of process claims. *See Rogoff v.*

1 *Marsh*, No. 80870-DOA, 482 P.3d 1221, 2021 WL 1100374, at *2 (Nev. Ct. App. 2021).
 2 Although it seems unlikely that Sternberg can amend to plausibly allege an abuse of process
 3 claim, I grant Sternberg leave to amend this claim if he can assert facts in support that do not run
 4 afoul of the litigation privilege.

5 6. Civil Conspiracy

6 Warneck contends that the civil conspiracy claim fails because she cannot conspire with
 7 her own attorney unless Sternberg alleges something beyond a typical attorney-client
 8 relationship, which he has not done. She also argues that Sternberg's allegations regarding
 9 fraudulent filings in the custody case are not pleaded with particularity as required under Rule
 10 9(b). Finally, she argues this claim is based on her litigation conduct, so it is barred by the
 11 litigation privilege. Sternberg responds that he does not have access to the court file in his
 12 custody case, which he needs to plead his claim with particularity. He also argues the litigation
 13 privilege does not apply because the claim encompasses conduct beyond filing documents in
 14 court, such as abducting the children from Nevada. And he argues that kidnapping is not in the
 15 normal scope of an attorney-client relationship.

16 Under Nevada law, “[a]n actionable civil conspiracy consists of a combination of two or
 17 more persons who, by some concerted action, intend to accomplish an unlawful objective for the
 18 purpose of harming another, and damage results from the act or acts.” *Consol. Generator-Nev.,*
 19 *Inc. v. Cummins Engine Co., Inc.*, 971 P.2d 1251, 1256 (Nev. 1998) (quotation omitted). The
 20 unlawful objective does not necessarily have to amount to a tort. *Cadle Co. v. Woods &*
 21 *Erickson, LLP*, 345 P.3d 1049, 1052 (Nev. 2015) (en banc). A plaintiff must allege an explicit or
 22 tacit agreement among the conspirators. *Guilfoyle v. Olde Monmouth Stock Transfer Co., Inc.*,
 23 335 P.3d 190, 198-99 (Nev. 2014) (en banc). Direct evidence of an agreement to harm the

1 plaintiff is not required, but the plaintiff must allege facts from which to infer such an agreement
 2 existed. *See id.* at 199. An agent cannot conspire with its principal when the agent acts in its
 3 official capacity on behalf of the principal. *Collins v. Union Fed. Sav. & Loan Ass'n*, 662 P.2d
 4 610, 622 (Nev. 1983). A lawyer is his or her client's agent. *Estate of Adams by and through*
 5 *Adams v. Fallini*, 386 P.3d 621, 625 (Nev. 2016); *see also C.I.R. v. Banks*, 543 U.S. 426, 436
 6 (2005) (describing the lawyer-client relationship as "a quintessential principal-agent
 7 relationship").

8 As I have discussed with respect to some of Sternberg's other claims, his conspiracy
 9 allegations are conclusory. Additionally, he cannot base this claim on a conspiracy between
 10 Warneck and her attorney unless he is able to allege facts showing that Warneck's attorney was
 11 not acting on her behalf as her attorney, but instead was acting for his own "individual
 12 advantage." *Cap. Advisors, LLC v. Cai*, 548 P.3d 1202, 1211 (Nev. 2024). But I grant Sternberg
 13 leave to amend to add facts from which an agreement to accomplish an unlawful objective could
 14 plausibly be inferred. A conspiracy to deceive Sternberg into allowing a temporary visit outside
 15 Nevada to relocate the children in contravention of the parents' agreement would not be barred
 16 by the absolute litigation privilege, so amendment would not be futile. Likewise, depending on
 17 what facts Sternberg alleges about what Warneck's attorney did to assist her in the relocation,
 18 those facts may suffice to support a conspiracy claim despite the agency relationship.

19 7. California Civil Code § 49

20 Warneck argues that Sternberg's claim under California Civil Code § 49 fails because
 21 Sternberg alleges that she abducted the children from Nevada, so this California statute regarding
 22 the abduction of a child does not apply to her conduct. Alternatively, she contends that § 49 does
 23 not apply to a person like her who had custodial rights over the child allegedly abducted.

1 Sternberg responds that Warneck relies on a maritime case that is inapplicable to this lawsuit.
2 He also argues that the abduction is ongoing because the children are now located in California.
3 And he contends that he is bringing this claim on behalf of his children, who can sue the
4 abducting parent. Finally, he argues that a parent who abducts a child may be liable under the
5 statute. In reply, Warneck withdraws her argument that a § 49 claim cannot be brought against a
6 parent. ECF No. 137 at 10 n.2. But she argues that Sternberg was injured in Nevada, not
7 California, so the statute does not apply, and that the FAC pleads this claim is being brought by
8 Sternberg, not the children.

9 California Civil Code § 49(a) forbids the “abduction or enticement of a child from a
10 parent, or from a guardian entitled to its custody.” To determine whether this law applies in this
11 case, I must determine what choice of law rules to apply: federal common law or the law of the
12 forum state, which here is Nevada. This case is ostensibly based on federal question jurisdiction
13 due to Sternberg’s assertion of various federal claims. When a case is brought in federal court
14 based on federal question jurisdiction but “state law supplies the substantive rule of decision”
15 and “there is no federal interest in supplanting the otherwise applicable choice-of-law rule,” then
16 I apply the forum state’s choice-of-law principles. *Cal. Dep’t of Toxic Substances Control v. Jim*
17 *Dobbas, Inc.*, 54 F.4th 1078, 1089 (9th Cir. 2022) (simplified).

18 Warneck’s motion relies on maritime cases for her choice-of-law argument. ECF No. 124
19 at 11 (citing *Ferguson v. Horizon Lines, Inc.*, 602 Fed. Appx. 664, 665-66 (9th Cir. 2015);
20 *Solano v. Beilby*, 761 F.2d 1369, 1371 (9th Cir. 1985)). In those cases, the courts were
21 determining whether the cases fell within the court’s admiralty jurisdiction, and the courts used
22 federal common law to make that determination. That is different than determining what law
23 applies as between two states. Because Warneck’s motion did not cite the correct law, neither

1 she nor Sternberg have adequately addressed whether Sternberg can pursue this claim under
2 California law. I therefore deny Warneck's motion to dismiss it, without prejudice to refiling a
3 motion to dismiss this claim. However, as I explain in orders addressing other defendants'
4 motions to dismiss, Sternberg cannot bring this claim on behalf of his children unless he obtains
5 counsel. *See Grizzell v. San Elijo Elementary Sch.*, 110 F.4th 1177, 1181 (9th Cir. 2024)
6 (acknowledging potential concerns but concluding that controlling Ninth Circuit law "holds that
7 a parent may not proceed pro se on her children's behalf"). Consequently, this claim is brought
8 on Sternberg's behalf only.

9 **C. Amendment**

10 Sternberg requests leave to amend if I find he has not plausibly alleged a claim. Warneck
11 argues that amendment would be futile because Sternberg does not identify facts that he could
12 plead to state plausible claims. A pro se litigant should generally be notified of his complaint's
13 deficiencies and given at least one opportunity to cure them. *Cato v. United States*, 70 F.3d 1103,
14 1106 (9th Cir. 1995). I therefore have granted Sternberg leave to amend where it would not be
15 futile for him to do so.

16 The amended complaint must be a complete document in and of itself and will supersede
17 the original complaint in its entirety. Any allegations, parties, or requests for relief from prior
18 papers that are not carried forward in the amended complaint will no longer be before the court.
19 Sternberg is advised to support each claim with factual allegations because all complaints "must
20 contain sufficient allegations of underlying facts to give fair notice and to enable the opposing
21 party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). When
22 claims are alleged against multiple defendants, the complaint should clearly indicate which
23 claims apply to which defendant. *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996).

1 Sternberg also should specifically identify each defendant and support each claim with factual
2 allegations about each defendant's actions. Where multiple claims are alleged, the complaint
3 should identify which factual allegations give rise to each particular claim. I discourage
4 Sternberg from breaking up his amended complaint into four documents as he did with the FAC.
5 Having to flip between multiple documents to attempt to discern what claims he is asserting
6 against which defendants based on what facts is burdensome. As discussed in this order and
7 orders on motions to dismiss filed by other defendants, if any of Sternberg's claims are grounded
8 in fraud, he must plead those claims with particularity even if they are not labeled as fraud
9 claims. Finally, I caution Sternberg to proceed carefully to avoid facing another anti-SLAPP
10 motion like the one filed by Warneck.

11 **D. Anti-SLAPP Motion**

12 Warneck filed a special motion to dismiss under Nevada's Anti-SLAPP statute, NRS
13 § 41.660. Warneck argues that Sternberg's abuse of process and civil conspiracy claims are
14 based on statements she made in litigation or to law enforcement, she made those statements in
15 good faith, and her conduct is absolutely privileged, so Sternberg's claims are meritless. She
16 therefore seeks attorney's fees for having to defend against these claims.

17 Sternberg responds that he sues her for the "non-communicative predicate act of the
18 felony abduction of [the] children," so he is not suing her for statements she made in litigation.
19 ECF No. 132 at 11. Alternatively, he contends that if I conclude this is a SLAPP suit, then I
20 should grant him the opportunity to conduct discovery to oppose the anti-SLAPP motion because
21 the information he needs is in other people's custody and control, including the custody case file
22 to which he does not have access, as well as any statements Warneck made to law enforcement.
23

1 Warnecke replies that the FAC's allegations show that the abuse of process and civil
2 conspiracy claims are based on Warnecke's actions and statements in the custody case, not the
3 alleged pre-suit kidnapping. She contends that Sternberg cannot recharacterize these claims
4 through his opposition to avoid dismissal. She also argues that Sternberg's request for discovery
5 is procedurally improper because he did not meet Rule 56(d)'s requirements.

6 Under Nevada's anti-SLAPP statute, a "person who engages in a good faith
7 communication in furtherance of the right to petition or the right to free speech in direct
8 connection with an issue of public concern is immune from any civil action for claims based
9 upon the communication." NRS § 41.650. A defendant may file a special motion to dismiss if
10 the defendant can show "by a preponderance of the evidence, that the claim is based upon a good
11 faith communication in furtherance of the right to petition or the right to free speech in direct
12 connection with an issue of public concern." *Id.* § 41.660(3)(a). To meet this burden, the
13 defendant must show that his or her communications "fall into one of the four categories of
14 good-faith communications enumerated in NRS 41.637," and that the communications are
15 truthful or were made without knowledge of their falsity. *Panik v. TMM, Inc.*, 538 P.3d 1149,
16 1152-53 (Nev. 2023).

17 As relevant here, a good faith communication in furtherance of the right to petition
18 means:

19 [c]ommunication that is aimed at procuring any governmental or electoral action,
20 result or outcome;
21 [c]ommunication of information or a complaint to a Legislator, officer or
employee of the Federal Government, this state or a political subdivision of this
state, regarding a matter reasonably of concern to the respective governmental
entity; [or]
22 [a w]ritten or oral statement made in direct connection with an issue under
consideration by a legislative, executive or judicial body, or any other official
proceeding authorized by law . . .

1 which is truthful or is made without knowledge of its falsehood.

2 NRS §§ 41.637(2)-(3). “Absent contradictory evidence in the record,” the defendant’s sworn
3 declaration that she believes her statements were true is sufficient to meet the defendant’s burden
4 of showing the communication was in good faith. *Stark v. Lackey*, 458 P.3d 342, 347 (Nev.
5 2020) (en banc).

6 If the defendant makes this initial showing, the burden shifts to the plaintiff to show
7 “with prima facie evidence a probability of prevailing on the claim.” *Id.* at 345; NRS
8 § 41.660(3)(b). If a plaintiff can show that information necessary to meet his burden “is in the
9 possession of another party or a third party and is not reasonably available without discovery, the
10 court shall allow limited discovery for the purpose of ascertaining such information.” NRS
11 § 41.660(4).

12 1. Civil Conspiracy

13 Warneck has not met her burden at step one of showing that the civil conspiracy claim is
14 based on a communication in furtherance of the right to petition. Sternberg’s civil conspiracy
15 claim, as currently pleaded, alleges that Warneck and her attorney “planned, coordinated, and
16 executed the unlawful relocation of [the] children from Nevada as outlined in this complaint for
17 the purpose of harming and interfering with [Sternberg’s] rights to [his] children, [and] to
18 ambush [him] in order to obstruct the due course of justice.” ECF No. 86-4 at 2. This claim is
19 not based on a communication at all, much less a communication protected under Nevada’s anti-
20 SLAPP statute. I therefore deny Warneck’s anti-SLAPP motion based on the civil conspiracy
21 claim.

22 ////

23 ////

1 2. Abuse of Process

2 Warneck has met her burden of showing that Sternberg's abuse of process claim is based
3 on communications in furtherance of Warneck's petitioning rights. The abuse of process claim
4 alleges that Warneck initiated the custody and criminal cases in California, filed false documents
5 in those proceedings, and made false statements to the courts and to law enforcement. ECF No.
6 86-4 at 1. Those are communications in direct connection with an issue under consideration by a
7 judicial body or statements designed to prompt law enforcement to act. She also met her burden
8 of establishing that her communications were in good faith because she states in a sworn
9 declaration that she did not knowingly make any false statements in the custody case or to law
10 enforcement. ECF No. 124-1 at 3-4.

11 Because Warneck met her burden, the burden shifts to Sternberg to show with prima
12 facie evidence a probability of prevailing on his abuse of process claim. Sternberg has not
13 attempted to do so, instead asserting that he needs discovery because information necessary to
14 rebut the motion is in the possession of others and is not reasonably available without discovery.
15 Specifically, he contends that he has no access to the custody court case file in California. He
16 asserts that he has caught Warneck and her attorney filing a different version of a document than
17 what was served on him, and he contends that he therefore needs discovery to compare what is in
18 the official court record versus what was served on him. He also argues that he needs discovery
19 to obtain Warneck's statements to law enforcement.

20 Warneck asserts that Sternberg's request for discovery is procedurally improper because
21 he did not meet Rule 56(d)'s requirements. But Warneck cites no authority for the proposition
22 that Rule 56(d) applies to a request for discovery under Nevada's anti-SLAPP statute. The
23 Supreme Court of Nevada has stated that the showing for discovery under § 41.660(4) "should

1 include, at the minimum, a description of the facts the plaintiff expects to uncover, and how
2 those facts will enable the plaintiff to demonstrate a *prima facie* case on any of its claims.”
3 *Anderson Bus. Advisors, LLC v. Foley*, Nos. 82633, 82949, 83326, 84499, 84975, 540 P.3d 1055,
4 2023 WL 8663677, at *4 (Nev. 2023) (declining to address an argument regarding an affidavit
5 requirement under Nevada Rule of Civil Procedure 56(d)). I therefore decline to hold Sternberg
6 to Rule 56(d)’s dictates and instead apply the Supreme Court of Nevada’s test.

7 Sternberg states that he expects to find Warneck (or her attorney on her behalf) made
8 false statements in the custody proceedings. Any such communications are subject to the
9 absolute litigation privilege, even if Warneck knowingly and maliciously made false statements
10 in the court proceedings. *Fink v. Oshins*, 49 P.3d 640, 643 (Nev. 2002). Sternberg thus cannot
11 show a probability of prevailing on his abuse of process claim based on false statements in the
12 custody case because the absolute litigation privilege precludes Warneck’s liability. *Williams v.*
13 *Lazer*, 495 P.3d 93, 99 (Nev. 2021) (en banc) (holding that if the absolute litigation privilege
14 applies, then a plaintiff facing an anti-SLAPP motion cannot meet its burden of showing its
15 claim has minimal merit). Further discovery on the alleged false statements would not change
16 this result. I therefore deny Sternberg’s request for further discovery on this issue and grant
17 Warneck’s anti-SLAPP motion to dismiss the abuse of process claim based on allegedly false
18 statements in the custody proceedings.

19 In his request for discovery, Sternberg states that he also would like Warneck’s
20 statements to law enforcement, presumably because he believes she made false statements to law
21 enforcement. He also states that he would like to compare the custody court record with his own
22 copies because he previously caught Warneck’s attorney serving him with a copy of a filing that
23 did not match the document filed with the court. Sternberg alleges in his FAC that he caught

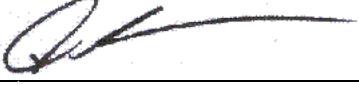
1 Warneck's attorney filing a different document than what he was served with, so presumably
2 Sternberg should have been able to state at least one specific example of this, but he did not. *See*
3 ECF No. 86-3 at 11. Sternberg does not describe what false statements or incorrect filings he
4 expects to find, nor does he articulate how those facts will enable him to demonstrate a *prima
facie* case on his abuse of process claim. I therefore deny his request for discovery and grant
5 Warneck's anti-SLAPP motion on the abuse of process claim.

7 **II. CONCLUSION**

8 I THEREFORE ORDER that defendant Shelley Warneck's motion to dismiss (ECF No.
9 **124**) is **GRANTED in part** as set forth in this order.

10 I FURTHER ORDER that by January 16, 2025, plaintiff Michael Sternberg may file a
11 second amended complaint curing the deficiencies identified in this order if facts exist to do so.
12 If Sternberg does not amend, his claims against defendant Shelley Warneck for tortious
13 interference with parental rights and violation of California Civil Code § 49 will proceed.

14 DATED this 14th day of November, 2024.

15 
16 ANDREW P. GORDON
17 CHIEF UNITED STATES DISTRICT JUDGE
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